No. 89-152

In the Supreme Court of the United States

OCTOBER TERM, 1989

VERA M. ENGLISH, PETITIONER

v.

GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, which provides a federal administrative remedy for employees who suffer employment discrimination in retaliation for making nuclear safety complaints, preempts an employee's state law tort claim based on such retaliation.

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INTEREST OF THE UNITED STATES

Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, authorizes the Department of Labor to adjudicate allegations of employees who claim they have suffered employment discrimination in retaliation for making nuclear safety complaints. The Nuclear Regulatory Commission (NRC) does not participate in proceedings instituted under Section 210, but is extremely interested in learning of safety violations by licensees of nuclear facilities. See 47 Fed. Reg. 54,585 (1982). This case presents the issue whether Section 210 preempts state law tort remedies otherwise available to employees who suffer retaliation because they "blew the whistle" on nuclear safety violations. That issue implicates the De-

partment of Labor's programmatic interest in ensuring full and adequate relief to such employees and the NRC's interest in ensuring compliance with nuclear safety regulations; as a result, the United States has a substantial interest in the outcome of this case. The Court previously recognized the government's interest when, at the jurisdictional stage, it invited the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Petitioner Vera English was employed from 1972 to 1984 as a laboratory technician at the nuclear fuels production facility in Wilmington, North Carolina, operated by respondent General Electric. In this diversity action, petitioner contends that General Electric retaliated against her for making nuclear safety complaints, and asserts a state law claim for intentional infliction of emotional distress. Pet. App. 2a, 6a-7a.

1. In February 1984, petitioner complained to General Electric's management and to the Nuclear Regulatory Commission (NRC) about a number of perceived violations of nuclear safety standards at the Wilmington facility. She complained in particular about the failure of her co-workers to clean up spills of radioactive materials in the laboratory.[1] Frustrated with her employer's failure to address her concerns, petitioner, on one occasion, deliberately failed to clean a work table contaminated during a preceding shift with a uranium solution. Instead, she outlined the contamination with red tape to bring

[1] Although petitioner made similar complaints over the years (Pet. 6), this action appears to be based solely on events occurring in 1984 (Pet. App. 2a, 7a-8a).

the matter to the other workers' attention. A few days later, petitioner showed her supervisor the marked-off areas, which had not been cleaned in the interim. As a result, work was halted while the laboratory was inspected and cleaned. Pet. App. 2a, 7a-9a; *English* v. *Whitfield*, 858 F.2d 957, 959 (4th Cir. 1988).

General Electric charged petitioner with a knowing failure to clean up contamination, and temporarily reassigned her to other work. On April 30, 1984, management informed her that she would be laid off unless she successfully bid within 90 days for a position in an area of the facility that did not involve exposure to nuclear materials. Pet. App. 2a, 9a-10a. On May 15, 1984, petitioner was notified of the final company decision affirming this disciplinary action. When petitioner had not found another position by July 30, 1984, her employment was terminated. *English* v. *Whitfield*, 858 F. 2d at 959, 960.[2]

2. On August 24, 1984, petitioner filed a complaint with the Secretary of Labor under Section 210 of the Energy Reorganization Act, 42 U.S.C. 5851, which prohibits employers from discharging or otherwise discriminating against "nuclear whistleblowers," *i.e.*, employees who complain about nuclear safety violations.[3] Petitioner alleged that General

[2] Technically, petitioner was placed on layoff status on July 30, and thus retained certain benefits and recall rights. See Br. in Opp. 2 n.1; *English* v. *Whitfield*, 858 F.2d at 960 n.1. As a practical matter, however, she was no longer employed by General Electric after July 30, 1984.

[3] If an employee believes that he has been discharged or otherwise discriminated against in violation of Section 210(a), he may file a complaint with the Secretary of Labor within 30 days after the violation occurs. 42 U.S.C. 5851(b)(1). The Secretary investigates the alleged violation, holds a public

Electric's actions constituted unlawful employment discrimination in retaliation for her complaints to management and the NRC. Pet. App. 3a n.2, 31a. An administrative law judge found that General Electric had violated the Energy Reorganization Act when it transferred and then discharged petitioner. *Id.* at 30a-56a. The Secretary, however, dismissed the complaint as untimely because it had not been filed within 30 days after the May 15 notice of the final company decision. *English* v. *General Electric Co.*, No. 85-ERA-2 (Jan. 13, 1987). The Fourth Circuit affirmed that decision, but remanded for consideration of petitioner's separate claim that she was subjected to a continuing course of retaliatory harassment after the May 15 disciplinary decision. *English* v. *Whitfield*, *supra*. On remand, the ALJ also dismissed that claim as time-barred. *English* v. *General Electric Co.*, No. 85-ERA-2 (Recommended Decision and Order Apr. 5, 1989). The ALJ's recommended decision is pending before the Secretary.

3. In March 1987, petitioner filed this action against respondent in federal district court. Petitioner alleged that she had been terminated in violation of the public policy evidenced in federal nuclear safety laws and that she was suffering from severe depression and emotional difficulties as a result of

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hearing, and, within 90 days of receiving the complaint, issues an order that either provides or denies relief. 42 U.S.C. 5851(b)(2)(A). If a violation is found, the Secretary may order reinstatement with back pay, award compensatory damages, and require the violator to pay the employee's costs and attorney's fees. 42 U.S.C. 5851(b)(2)(B). Any person adversely affected by an order of the Secretary may seek review in the federal court of appeals, and either the Secretary or the complainant may obtain enforcement of the Secretary's orders in federal district court. 42 U.S.C. 5851(c)-(e).

her employer's "intentional, malicious, extreme and outrageous conduct." Pet. 8; Pet. App. 6a, 11a. In addition to challenging General Electric's actions in transferring and ultimately firing her, petitioner alleged that General Electric had: (1) removed her from the laboratory position under guard "as if she were a criminal"; (2) assigned her to degrading "make work" in her substitute assignment; (3) derided her as "paranoid"; (4) barred her from working in controlled areas; (5) placed her under constant surveillance during work hours; (6) isolated her from co-workers, even during lunch periods; and (7) conspired to charge her fraudulently with violations of safety and criminal laws. Pet. App. 27a. Petitioner sought compensatory and punitive damages.

The district court granted General Electric's motion to dismiss. Pet. App. 6a-29a. The court first rejected the company's arguments that Section 210 regulates nuclear safety, a field preempted by the federal government. *Id.* at 17a, 18a. But it held (*id.* at 19a-23a) that three aspects of Section 210 nevertheless required it to conclude that petitioner's state law claims are preempted: (1) the provision barring recovery by any employee who "deliberately causes a violation of any requirement of [the Energy Reorganization Act] or of the Atomic Energy Act" (42 U.S.C. 5851(g)); (2) the absence of any provision for exemplary (or punitive) damage awards by the Secretary of Labor (42 U.S.C. 5851(b)(2)(B));[4] and (3) the requirement that whistleblowers

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[4] The statute does, however, provide for the recovery of exemplary damages in civil actions brought by the Secretary to enforce her remedial orders in district court. See 42 U.S.C. 5851(d) (district courts "have jurisdiction to grant all appro-

file their administrative complaints within 30 days after the violations occur, and that the Secretary resolve such complaints within 90 days after filing (42 U.S.C. 5851(b)(1) and (2)(A)). As the court perceived it, Congress enacted these provisions to obtain speedy resolution of nuclear safety concerns, to limit exemplary damage awards against the nuclear industry, and to preclude reinstatement and compensation of employees who violate nuclear safety requirements—goals that the court found incompatible with the broader remedies available under state tort law. Pet. App. 21a-22a.[5]

In a per curiam opinion, the Fourth Circuit affirmed the dismissal of petitioner's emotional distress claim for the reasons stated by the district court. Pet. App. 1a-3a.[6] The court of appeals concluded that Congress had intended to foreclose nuclear whistleblowers from pursuing state tort remedies, and stated that the district court "correctly identified and applied the relevant federal and state law." *Id.* at 3a.

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priate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages").

[5] The court alternatively held that petitioner had failed to state a cause of action for wrongful discharge because North Carolina law does not recognize the tort of wrongful discharge absent a specific duration employment contract, the giving of additional consideration for protected tenure, or a discharge for refusing to give perjured testimony. The court concluded that petitioner had stated a valid state law claim for intentional infliction of emotional distress. Pet. App. 24a-27a.

[6] Petitioner did not appeal the dismissal of her wrongful discharge claim, and that claim is accordingly no longer at issue.

SUMMARY OF ARGUMENT

State law is preempted by implication where Congress has evidenced its intent to occupy a given field or where state regulation actually conflicts with federal law. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). However, the intent to preempt must be "clear and manifest" where it involves a field traditionally occupied by the States (*Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977)), and tort law is such a field (*Farmer* v. *United Bhd. of Carpenters*, 430 U.S. 290, 304 (1977)).

1. Congress has occupied the field of nuclear safety regulation. However, the district court correctly concluded that nuclear safety concerns are "only tangential" to petitioner's tort claim. Pet. App. 17a. Its decision that preemption is therefore not warranted on account of intrusion into nuclear safety matters is confirmed by this Court's decision in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 213 (1983). In that case, the Court upheld a state law establishing a moratorium on nuclear power plant certification because it determined that there was "a nonsafety rationale" supporting it. States have authorized awards for intentional infliction of emotion distress not because of any concern with nuclear safety, but because of their traditional interest in protecting citizens from abuse. *Farmer*, 430 U.S. at 302. Accordingly, such tort actions do not intrude on the field that Congress has occupied. That conclusion is also supported by the decision in *Silkwood*, where the Court held that state tort remedies for exposure to radiation are not preempted because Congress has not "expressly supplanted" those remedies. 464 U.S. at 255.

2. The courts below erred by concluding that petitioner's claim for intentional infliction of emotional distress is preempted by Section 210, the "nuclear whistleblower" provision. Section 210 does not occupy a "field," but is merely a single statutory remedy for a particular type of employment discrimination by employers in a single industry. In any event, even a comprehensive regulatory scheme preempts state law only if there are "special features warranting preemption" (*Hillsborough County* v. *Automated Medical Labs.*, 471 U.S. 707, 719 (1985)), and there are no "special features" in this case. Neither the statute nor its legislative history provide any reason to conclude that Congress intended to supplant, rather than supplement, state remedies.

None of the three provisions of Section 210 relied upon by the district court conflict with petitioner's claim in a manner that warrants preemption or indicates that Congress intended to occupy the field of nuclear whistleblower protection. Section 210(g), which provides that "Subsection (a) of this section" does not provide a remedy to employees who deliberately violate safety regulations, says nothing about state tort remedies. Moreover, any potential conflict can be eliminated by allowing employers to assert a federal law defense incorporating Section 210(g) in state actions. Nor does the absence of a provision in Section 210 authorizing the Secretary to award exemplary damages require preemption. "Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law" (*California* v. *ARC America Corp.*, 109 S. Ct. 1661, 1667 (1989)), and there is no evidence that Congress intended not to allow exemplary damage awards against operators of nuclear facilities. See *Silkwood*, 464 U.S. at 245 (affirming a

$10 million punitive damage award against the operator of a nuclear facility); Section 210(d) (authorizing district courts to award exemplary damages in enforcement actions brought by the Secretary). Likewise, the expeditious time frames in Section 210 simply indicate that Congress wanted *federal* whistleblower complaints to be resolved quickly. That a 30-day limit for filing federal claims is not inconsistent with state regulation is clear from the fact that six other federal whistleblower statutes—each of which operates in a field where state regulation is not preempted—also have such a requirement.

ARGUMENT

PETITIONER'S STATE-LAW TORT CLAIM ARISING OUT OF EMPLOYER RETALIATION FOR MAKING NUCLEAR SAFETY COMPLAINTS IS NOT PREEMPTED BY FEDERAL LAW

State law is preempted under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, in three circumstances. See *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 152-153 (1982); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). In the first situation—not applicable here—Congress defines expressly the extent to which its enactments have preemptive effect. See, *e.g.*, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), construed in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95-97 (1983). Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left

no room for the States to supplement it," or where an Act of Congress " 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. at 299-300 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230). Third, state law is preempted to the extent that it actually conflicts with federal law. Thus, preemption is inferred where it is impossible to comply with both federal and state requirements (see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963)), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

In all preemption inquires, the "ultimate touchstone" is Congress's purpose in enacting the particular law claimed to have preemptive effect. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 747 (1985); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); see also *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. at 152 ("[t]he pre-emption doctrine * * * requires us to examine congressional intent"); *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976) (finding no preemption, even in the predominantly federal area of immigration regulation, where there was "affirmative evidence * * * that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law"). Because preemption raises important and sensitive federalism concerns, it is presumed that Congress ordinarily does not intend to displace existing state authority.[7] Moreover, "[w]here * * * the field which

[7] It is axiomatic that, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin* v. *Levitt*, 110 S. Ct. 792, 795 (1990).

Congress is said to have preempted has been traditionally occupied by the States," the intent of Congress to supersede state laws must be "clear and manifest." *Jones* v. *Rath Packing Co.*, 430 U.S. at 525; see also *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988) (congressional preemption of state regulation cannot be accomplished "subtly"); cf. *Savage* v. *Jones*, 225 U.S. 501, 533 (1912) (state law is deemed to be in conflict with an Act of Congress only if the "purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect").

Tort law is a field traditionally occupied by the States. In *Farmer* v. *United Bhd. of Carpenters*, 430 U.S. 290, 304 (1977), the Court recognized "the legitimate and substantial interest of the State in protecting its citizens" by allowing intentional infliction of emotional distress claims, and held that the plaintiff's claim was not preempted by the National Labor Relations Act. Since in this case there is no claim that Congress has expresly preempted state law, petitioner's intentional infliction of emotional distress action is preempted only if it is "clear and manifest" that the claim infringes on a field that Congress has occupied to the exclusion of the States or if there is an actual conflict between federal and state law such that allowing petitioner to go forward with her claim will frustrate the purposes underlying Section 210.

A. Congress's Occupation Of The Field Of Nuclear Safety Regulation Does Not Preclude Tort Actions Based On Employer Retaliation For Making Nuclear Safety Complaints

Congress has occupied the field of nuclear safety regulation. However, the courts below correctly rejected General Electric's contention that petitioner's emotional distress claim is therefore preempted. As the district court explained, "while nuclear safety is of concern in this action it is only tangential to the action itself." Pet. App. 17a. This Court's decision in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), makes clear that where state law serves a valid purpose unrelated to nuclear safety, it is not preempted despite some relationship to nuclear matters.

A California law that imposed a moratorium on the certification of nuclear power plants until a state commission found that there had been a federally-approved technology for the disposal of nuclear wastes was at issue in *Pacific Gas & Elec. Co.* The Court held that the law was not preempted. Based on the legislative history of the Atomic Energy Act of 1954 and subsequent amendments, which showed that Congress intended exclusive federal regulation of "the radiological safety aspects involved in the construction and operation of a nuclear plant," the Court first concluded that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 461 U.S. at 212. At the same time, the Court emphasized that this exclusive federal authority over safety matters does not extend to the regulation of nuclear facilities for economic and other non-safety purposes. *Id.* at 205-212; see, *e.g.*, Atomic Energy Act, 42 U.S.C. 2021(k) ("[n]othing

in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards"). Accordingly, the Court held that whether the California moratorium was preempted depended on "whether there is a nonsafety rationale" supporting it. *Pacific Gas & Elec. Co.*, 461 U.S. at 213. The Court concluded that there was a valid economic purpose for the moratorium, since the California legislature was concerned that nuclear power plants might ultimately be shut down if acceptable permanent waste disposal methods were not developed, and upheld the law despite its relationship to nuclear power.

Petitioner's claim is not preempted because there is a nonsafety rationale supporting a state law action for intentional infliction of emotional distress. Indeed, unlike the California law at issue in *Pacific Gas & Elec. Co.*, emotional distress actions bear no special relationship to nuclear matters. Rather, they are generally available to victims of intentional harassment, and reflect the state's "substantial interest in protecting its citizens from the kind of abuse of which [petitioner] complain[s]." *Farmer* v. *United Bhd. of Carpenters*, 430 U.S. at 302; see also *Dickens* v. *Puryear*, 302 N.C. 437, 276 S.E.2d 325, 331 (1981) (liability arises in North Carolina when "conduct exceeds all bounds usually tolerated by decent society" and "causes mental distress of a very serious kind," citing W. Prosser, *Law of Torts* § 12, at 56 (4th ed. 1971)); *Woodruff* v. *Miller*, 64 N.C. App. 364, 307 S.E.2d 176, 178 (1983) (recognizing that the tort of intentional infliction of emotional distress "provides an orderly way for the community to disapprove of [extreme and outrageous conduct] and compensate those victimized by it"). Thus, to an even greater extent than the moratorium

upheld in *Pacific Gas & Elec. Co.*, by which the state arguably sought to regulate plant construction for safety purposes, an emotional distress action has a basis in non-nuclear social and economic policy that saves it from preemption.[8]

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[8] Because petitioner did not appeal from the dismissal of her wrongful discharge claim, whether such a claim would be preempted by Section 210 is not at issue. The arguments against preemption are less apparent in the context of a wrongful discharge complaint based on the public policy evidenced in federal nuclear safety laws since nuclear safety is a matter of exclusively federal concern. See *Pacific Gas & Elec. Co.*, 461 U.S. at 213 ("[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field"); see also *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. at 309 (state law preempted "whose central purpose is to regulate matters that Congress intended * * * to regulate"). But that difference does not command a different result. Even though protection of whistleblower activity implicates nuclear safety concerns, a state tort action is not preempted under *Pacific Gas & Elec. Co.* if it also effectuates a public policy distinct from nuclear safety. While, as we have discussed, the nonsafety rationale for an emotional distress claim is manifest, similar policies underlie any other tort or contract remedies for wrongfully discharged employees. See, *e.g.*, *Norris* v. *Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1152-1153 (1st Cir. 1989) (state interest in assuring good faith and fair dealing in commercial transactions, including employment contracts, and in promoting a general policy against termination of at-will employees in violation of a mandated public policy); *Stokes* v. *Bechtel N. Am. Power Corp.*, 614 F. Supp. 732, 741-742 (N.D. Cal. 1985) (state policy of "ensuring the continued employment and job security of its citizens * * * and in advancing the state's economic productivity through the promotion of the nuclear industry"); but see *Masters* v. *Daniel Int'l Corp.*, No. 88-1345 (10th Cir. Feb. 6, 1990), slip op. 4 (Section 210 "preempts any state law claim for wrongful termination for reporting safety violations under the Act").

The conclusion that petitioner's claim is not preempted on account of intrusion on the nuclear safety field is reinforced by this Court's decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984). In that case the Court held that state tort remedies for radiation-based injuries, including punitive damages, were available since "Congress assumed that traditional principles of state tort law would apply with full force unless they were *expressly supplanted*." *Id.* at 255 (emphasis added). The Court reached that conclusion even though it recognized that "there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability." *Id.* at 256. The relationship of petitioner's claim to nuclear safety concerns is certainly no more direct than in *Silkwood*, where the plaintiff's decedent was actually harmed by radiation. Thus, even though nuclear safety concerns are tangentially implicated by petitioner's suit, it is not barred since Congress has not provided that claims such as petitioner's are "expressly supplanted" by federal law.[9] See also *Good-*

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[9] The *Silkwood* Court, in upholding tort remedies for radiation-related injuries, found "added significance" in the absence of any federal remedy for such injuries. See 464 U.S. at 251. But that was not the basis for the Court's decision. We agree with the First Circuit that, absent a clear expression of congressional inent, there is "no good reason for barring state remedies to whistle blowers but allowing punitive damages [for injuries] * * * that might not have occurred if the whistleblower's complaints had been investigated." See *Norris* v. *Lumbermen's Mut. Casualty Co.*, 881 F.2d at 1151; see also *Gaballah* v. *PG & E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989) (finding *Silkwood* persuasive in the the whistleblower context); *Wheeler* v. *Caterpillar Tractor Co.*, 108 Ill. 2d 502, 485 N.E.2d 372, 376 (1985) (same).

year Atomic Corp. v. *Miller*, 486 U.S. 174, 186 (1988) (an increased state workers' compensation award for injury caused by a safety violation at a government-owned nuclear facility is "incidental regulatory pressure" that Congress finds acceptable).

B. Section 210 Does Not Occupy The Field Of Nuclear Whistleblower Remedies Or Conflict With Petitioner's Claim

Although the courts below correctly recognized that petitioner's claim is not preempted by Congress's occupation of the field of nuclear safety, they went on to hold the claim preempted by Section 210. The district court first indicated that it was analyzing petitioner's claim and Section 210 to determine " 'whether there is an irreconcilable conflict between federal and state standards.' " Pet. App. 19a (quoting *Silkwood*, 464 U.S. at 256). After completing its conflict analysis, however, the court stated that it found the " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " Pet. App. 22a-23a (quoting *Pacific Gas & Elec. Co.*, 461 U.S. at 204). Thus, the precise basis for the court's decision—*i.e.*, whether it is grounded on the theory that Congress has occupied the field of nuclear whistleblower regulation or on the theory that petitioner's claim actually conflicts with Section 210—is not entirely clear. However, an intent to preempt is not properly inferred under either theory.

1. As an initial matter, it would be odd to conclude that nuclear whistleblowing, by itself, is a "field." Labor relations between nuclear employers and their employees might be a "field" that Congress would choose to occupy (but has not), as might issues relating generally to retaliation by employers

against their employees for blowing the whistle on unsafe or illegal activities. But Section 210 is merely a single statutory provision granting a remedy to employees in one industry for one type of discrimination by employers.[10] Section 210 is not a code of conduct governing nuclear labor relations comprehensively or a code governing whistleblowing generally.[11]

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[10] It makes no difference that Section 210 bears some relationship to the nuclear safety field. As we have shown, and as the courts below concluded, petitioner's claim is not preempted on account of any infringement on the field of nuclear safety regulation. Moreover, the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, preempts state regulation of workplace safety and health with respect to matters governed by a specific federal standard, but does not preempt state law remedies for employees who suffer employment discrimination on account of their having filed complaints, testified, or otherwise exercised rights under the Act, even though the Act itself (29 U.S.C. 660(c)) provides a federal remedy for the same employer conduct. See *Lepore* v. *National Tool & Mfg. Co.*, 224 N.J. Super. 463, 540 A.2d 1296 (1988), aff'd, 115 N.J. 226, 557 A.2d 1371, cert. denied, 110 S. Ct. 366 (1989); accord *Kilpatrick* v. *Delaware County Society for Prevention of Cruelty to Animals*, 632 F. Supp. 542, 547-550 (E.D. Pa. 1986).

[11] In commenting on a bill that would provide comprehensive federal whistleblowing remedies, the Department of Labor recently recommended that Congress expressly preempt state remedies. Although General Electric finds it "inexplicabl[e]" that the government does not think that Section 210 preempts state law given its position on the pending legislation (see Supp. Br. in Opp. 3-4), the Solicitor of Labor explained that the Labor Department recommended preemption of state whistleblower remedies as part of "the proper balance to strike in the context of a uniform law" that "would apply to many different industries and situations," as distin-

In any event, the mere existence of a federal regulatory or enforcement scheme—even a rather comprehensive one—does not imply preemption of state remedies. As this Court has noted, "[u]ndoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. * * * Instead, we must look for *special features* warranting preemption." *Hillsborough County* v. *Automated Medical Labs.*, 471 U.S. at 719 (emphasis added). Thus, even where Congress has established a comprehensive regulatory or enforcement scheme, preemptive effect may not be inferred without specific indicia of legislative intent to exclude state activity in that field. See *id.* at 717 ("merely because the federal provisions [a]re sufficiently comprehensive to meet the need identified by Congress d[oes] not mean that States and localities [a]re barred from identifying additional needs or imposing further requirements in the field"); *De Canas* v. *Bica*, 424 U.S. at 359 (the "scope and detail" of the Immigration and Nationality Act does not evidence preemptive intent because the "comprehensiveness of legislation governing entry and stay of aliens [i]s to be expected in light of the nature and complexity of the subject");

guished from the single-industry approach embodied in existing law. See Statement of Robert P. Davis, Solicitor of Labor, before the Subcomm. on Labor-Management Relations, House Comm. on Education and Labor, at 1 (Nov. 16, 1989). Moreover, an obvious difference exists between advocating policies in regard to pending legislation and interpreting the intent behind existing laws. If anything, the Labor Department's support for express preemptive language in the proposed whistleblower legislation suggests its recognition that existing law does not preempt state remedies.

New York Dep't of Social Services v. *Dublino*, 413 U.S. 405, 415 (1973) ("[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem"); cf. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987) (preemptive effect of ERISA's "comprehensive" civil enforcement scheme is "fully confirmed" by its legislative history).[12]

An examination of the language and legislative history of Section 210 reveals no "special features" warranting a finding of preemptive intent. The statute simply prohibits employment discrimination against employees who make nuclear safety com-

[12] Respondent's reliance (Br. in Opp. 14) on decisions construing the preemptive effect of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, is misplaced. As an initial matter, that statute comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective bargaining agreement. Moreover, special factors support the conclusion that preemption of state labor relations law is warranted—specifically, Congress's perception that the NLRA was needed because state legislatures and courts were unable to provide an informed and coherent labor policy. See *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 286 (1971). In addition, even though the drafters of Section 210 patterned it after Section 8(a)(4) of the NLRA, 29 U.S.C. 158(a)(4) (see S. Rep. No. 848, 95th Cong., 2d Sess. 29 (1978)), they also based it (see *ibid.*) on the corresponding provision of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 110(b)(1), 83 Stat. 758—in which Congress expressly declined to preempt state laws in the same field. See § 506, 83 Stat. 803. Thus, in Congress's view, a whistleblower remedy, by itself, does not require preemption.

plaints and provides an administrative mechanism by which that prohibition can be enforced. Although its provisions are fairly detailed and comprehensive, the statute nowhere prohibits other remedies for the same conduct, or mandates procedures or remedies that are inherently inconsistent with other forms of relief. Moreover, as this Court recently observed, "[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." *California* v. *ARC America Corp.*, 109 S. Ct. at 1667 (holding that indirect purchasers may sue under state law to recover overcharges resulting from unlawful price-fixing, even though federal antitrust laws allow only direct purchasers to recover). Therefore, the fact that a federal statute provides limited remedies does not require preemption, unless there is a "clear purpose of Congress" to that effect. See *ibid.*[13] Thus, the fact that Congress enacted Section 210 does not support the conclusion that it has "occup[ied] an entire field of regulation, leaving no room for the States to supplement federal law." *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 109 S. Ct. 1262, 1273 (1989).

2. The district court found preemption based on its analysis of three provisions of Section 210—its bar to recovery by employees who deliberately violate

[13] The legislative history of Section 210 reveals no "clear purpose" to supplant state causes of action that might afford broader relief. Indeed, the only explanation for any of the statute's remedial limitations is the responsible congressional committee's statement that employees who deliberately violate nuclear safety requirements would be denied protection under Section 210(g) "[i]n order to avoid abuse of the protection afforded *under this section.*" S. Rep. No. 848, *supra*, at 30 (emphasis added).

federal nuclear safety requirements, the absence of any express provision for exemplary damage awards in the administrative proceedings, and the time limits for filing and adjudicating complaints. However, those limitations only purport to govern complaints brought under Section 210. Since Congress's decision not to provide a particular remedy typically reflects only the federal policy objectives addressed by the statute in question, such policy choices do not generally imply an intent to preclude States from invoking their own remedies. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 255; *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 663-666 (1954).

Furthermore, a detailed analysis of the three provisions fails to indicate any conflict warranting preemption of petitioner's claim. Section 210(g) provides that "Subsection (a) of this section shall not apply" where an employee deliberately causes a nuclear safety violation. Thus, Section 210(g) specifically limits its applicability to the remedy provided by Section 210(a), and does not suggest that it bars state-law actions. Moreover, any federal interest in prohibiting recovery by whistleblowers who participated in deliberate safety violations would be served by preempting state law only to the extent that it allows recovery by such violators. See *Boyle* v. *United Technologies Corp.*, 108 S. Ct. 2510, 2516 (1988) (observing that federal law preempts an entire body of state law only "where the federal interest requires a uniform rule" applicable to the subject area). Accordingly, Section 210(g), at most, would allow employers to assert a federal law defense against state law claims by employees excluded from Section 210's protection. See *Norris* v. *Lumbermen's Mut. Casualty Co.*, 881 F.2d 1144, 1150 (1st Cir.

1989); *Gaballah* v. *PG & E*, 711 F. Supp. 988, 990 (N.D. Cal. 1989).[14]

Nor does the absence of authorization for the Secretary to award exemplary damages under Section 210 imply legislative intent to bar state actions that permit such awards. Section 210(d) authorizes district courts to award exemplary damages in enforcement proceedings; thus, contrary to the district court, Section 210 does not reflect "an informed judgment that *in no circumstances* should a nuclear whistle[] blower receive punitive damages when fired or discriminated against because of his or her safety complaints." Pet. App. 22a (emphasis added). In addition, since "[o]rdinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law" (*California* v. *ARC America Corp.*, 109 S. Ct. at 1667), there is no warrant for preemption merely because Congress did not authorize the Secretary to award

[14] Although the Secretary of Labor has not yet addressed the issue in the context of an actual whistleblower complaint, we believe that the courts below misinterpreted the scope of subsection (g). The purpose of Section 210 would be defeated if, as the district court contended, its protection does not extend to an employee who "has violated a separate and distinct [nuclear safety] requirement," but has "neither contributed to nor caused the potential safety violation which he reported." Pet. App. 20a. It is more sensible to construe subsection (g) as barring relief only for those employees who claim protection because they have "blown the whistle" on the very safety violation that they have caused. Moreover, in our view Section 210(g) is essentially a strict version of the causation element inherent in any anti-discrimination law. See *Burdine* v. *Texas Dep't of Community Affairs*, 450 U.S. 248 (1981). Thus, it serves to bar a remedy under the federal statute where it is plausible that the employer penalized the employee for his safety violation, not for his whistleblowing.

exemplary damages. See *Silkwood* (allowing exemplary damage awards in state actions for injury caused by exposure to radioactive materials).

Likewise, the expeditious time frames in Section 210 primarily indicate only that Congress wanted federal whistleblower complaints to be filed and resolved quickly. To be sure, the 30-day filing requirement also helps to ensure, in some cases, that the government is aware of safety violations.[15] Of course, that notification purpose is implicated only where an employer retaliates against an employee who has complained to his employer or has indicated his intention to alert federal authorities, but who has not yet blown the whistle to the federal government; if the retaliation is in response to whistleblowing to federal authorities, then they are already aware of the safety problem whether or not the employee files a discrimination action under Section 210. In any event, nothing about the 30-day time limit is incompatible with state actions. In six other whistleblower protection statutes enacted in the 1970s or early 1980s—the Toxic Substances Control Act (TSCA), 15 U.S.C.

[15] Section 210(b) requires the Secretary of Labor to notify the NRC "[u]pon receipt of * * * a complaint" under the statute. Based on that provision, the two agencies have entered into a memorandum of understanding in which they agreed "to cooperate with each other to the fullest extent possible" in all cases arising under Section 210. 47 Fed. Reg. 54,585 (1982). As a result, the NRC is informed of any allegations of whistleblower discrimination, thus enabling that agency to address the underlying safety complaints and to impose its own sanctions on employers who retaliate against whistleblowing employees. See, *e.g.*, 10 C.F.R. 30.7. In this case, the NRC imposed a $20,000 fine on General Electric as a result of its investigation of petitioner's allegations. Pet. App. 57a.

2622; the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. 1367; the Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6971; the Clean Air Act (CAA), 42 U.S.C. 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9610—Congress also set a 30-day time limit for filing complaints,[16] although each of those other provisions exist in the context of a cooperative federal-state program that expressly permits concurrent state regulation. See TSCA, 15 U.S.C. 2617(a); FWPCA, 33 U.S.C. 1370; SDWA, 42 U.S.C. 300g-3(e); RCRA, 42 U.S.C. 6929; CAA, 42 U.S.C. 7416; CERCLA, 42 U.S.C. 9614(a). Thus, it is reasonable to assume that Congress intended Section 210 to supplement, not supplant, any state remedies that might exist. See *Gaballah* v. *PG & E*, 711 F. Supp. at 990.

Moreover, each of these six other whistleblower statutes denies coverage to deliberate violators of environmental statutes,[17] and only two expressly authorize the Secretary to award exemplary damages.[18] (In fact, the whistleblower provision of the Clean Air Act is virtually identical to Section 210.) The

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[16] See TSCA, 15 U.S.C. 2622(b)(1); FWPCA, 33 U.S.C. 1367(b); SDWA, 42 U.S.C. 300j-9(i)(2)(A); RCRA, 42 U.S.C. 6971(b); CAA, 42 U.S.C. 7622(b)(1); CERCLA, 42 U.S.C. 9610(b).

[17] See TSCA, 15 U.S.C. 2622(e); FWPCA, 33 U.S.C. 1367(d); SDWA, 42 U.S.C. 300j-9(i)(6); RCRA, 42 U.S.C. 6971(d); CAA, 42 U.S.C. 7622(g); CERCLA, 42 U.S.C. 9610(d).

[18] TSCA, 15 U.S.C. 2622(b)(2)(B); SDWA, 42 U.S.C. 300j-9(i)(2)(B)(ii)(IV).

fact that state regulation is permitted under those other statutes shows that the three subprovisions of Section 210 on which the district court relied do not necessarily conflict with concurrent state regulation or evidence an intent by Congress to occupy the field.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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